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In The

Supreme Court of the United States

October Term, 1994

PRIMATE AND BISHOPS' SYNOD OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA,

Petitioner,

v.

RUSSIAN ORTHODOX CHURCH OF THE HOLY RESURRECTION, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

Page

CASES:

Babcock Memorial v. Presbytery of Baltimore, 464 A. 2d 1008 (Md. 1983) 3

Bennison v. Sharp, 329 N.W. 2d 466 (Mich. App. 1983) 3

Bjorkman v. Protestant Episcopal Church in the United States, 759 S.W. 2d 583 (Ky. 1988) 3

Bose Corp. v. Consumers Union, 466 U.S. 485 (1984) 8

Fortin v. Roman Catholic Bishop of Worcester, 416 Mass. 781, 625 N.E. 2d 1352 (1994) 1, 7

Jones v. Wolf, 443 U.S. 595 (1979) 1, 7, 8

Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1954) 4

New York Times v. Sullivan, 376 U.S. 254 (1964) 8

Presbytery of Beaver-Butler of United Presbyterian Church v. Middlesex Presbyterian Church, 507 Pa. 255, 489 A. 2d 1317, *cert. denied*, 474 U.S. 887 (1985) 3

Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) 4

OTHER MATERIALS:

F.L. Cross and E.A. Livingstone, eds., *Oxford Dictionary of the Christian Church* (2d ed. 1974) 2

Patty Gerstenblith, *Civil Court Resolution of Property Disputes Among Religious Organizations*, 39 Am. U.L. Rev. 513 (1990) 5

TABLE OF AUTHORITIES – Continued

Page

John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 Cal. L. Rev. 847 (1984) 5

William Ross, *The Need for an Exclusive and Uniform Application of "Neutral Principles" in the Adjudication of Church Property Disputes*, 32 St. Louis U.L.J. (1987) 5

Timothy Ware, *The Orthodox Church* (1976) 2

1. The decision below is a particularly glaring example of the doctrinal confusion rampant among the state courts dealing with the resolution of disputes among religious communities after *Jones v. Wolf*, 443 U.S. 595 (1979). The Supreme Judicial Court of Massachusetts ruled that a religious community[1] that for over nineteen

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[1] As the lower courts did, Respondents refer to the Petitioner as an "umbrella organization." Br. in Opp. 1. Whatever one makes of this case, the Russian Orthodox Church Outside of Russia [ROCOR] is most emphatically not an umbrella organization. It, of course, does not make or sell umbrellas. Even when the term "umbrella organization" is given an appropriate metaphorical resonance, the term simply does not fit. For example, the Modern Languages Association may be described as "an umbrella organization that welcomes Dickens scholars, Old Norse language buffs, Marxists and medievalists all under the same roof." Amy Wallace, "For the Sake of Humanities," *Los Angeles Times*, Dec. 27, 1994, at A12. But ROCOR is not such a convenient gathering place for a motley bunch of wildly discordant views. As the Regulations of ROCOR illustrate, Pet. App. 25a-44a, ROCOR is a *church* that strives to be in conformity with the teachings of Jesus Christ and his Apostles. Respondents prove too little and too much when they suggest that the corporate law of Massachusetts settles the constitutional issues presented in this case. Br. in Opp. 1-2. They prove too little because the corporate law of Massachusetts is governed by the prohibition against "*any* law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const., Am. I. They prove too much because the same corporate law may not be held to grant a benefit to one religious community that is not afforded to another. The courts may not recognize the hierarchical character of the Roman Catholic Church, *Fortin v. Roman Catholic Bishop of Worcester*, 416 Mass. 781, 625 N.E. 2d 1352 (1994), and rule – as they did here – that Russian Orthodox Christians are governed by Bishops only in respect to doctrinal matters and not with respect to control over church property. *See* the discussion of the *Fortin* case below at 7.

centuries[2] has regarded itself as historically *hierarchical*, i.e., governed by bishops, could under the law of the

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[2] Respondents suggest that the Russian Orthodox Church became established in Russia in the 10th century. Br. in Opp. 1. Normally a dating error can be ignored in the Reply at this stage. In this instance, however, the slip discloses an important difference of perspective that we feel obliged to comment upon. Perhaps Respondents wish to call the attention of this Court to the 9th century mission of Saints Cyril and Methodius to the Slavs, whose followers reached Russia in the 10th century, whence comes the Cyrillic alphabet and the conversion of millions of Russians to Christianity in 988 A.D. *See, e.g.*, "Cyril, Saint (826-69), Methodius, Saint (c. 815-85), Apostles of the Slavs," F.L. Cross and E.A. Livingstone, eds., *Oxford Dictionary of the Christian Church*, 370 (2d ed. 1974); Timothy Ware, *The Orthodox Church*, Chapter 4, The Conversion of the Slavs, 82-95 (1976). No serious historian of the Orthodox Church would, however, date the beginning of the church in a particular country from the time of the journeys when missionaries brought the Gospel to that part of the world. Thus the Orthodox Church in its various national manifestations (such as the Greek Orthodox, the Russian Orthodox, or the Serbian Orthodox) traces its true origins to the outpouring of the Holy Spirit on the Apostolic community in Jerusalem on the first Pentecost (Acts of the Apostles 2:1-11). This is not a picky or irrelevant point. On the contrary, the central legal dispute in this case – whether secular courts will allow Orthodox Christians to be governed by Bishops – corresponds to a religious belief at the very core of Orthodox Christianity. These religious communities define themselves as "Orthodox" (or "believing rightly") precisely because of their insistence that the hierarchical governing structure or polity of the church reflects religious obedience to the teaching of the Apostles. This teaching is reflected in the hierarchical role of bishops, and more particularly in the teaching of the first seven ecumenical Councils of Bishops from the First Council of Nicaea in 325 A.D. to the Second Council of Nicaea in 787 A.D.

Commonwealth be regarded as a *congregationally* controlled organization for purposes of determining what to do with the church property when a local parish decides to defect from the church. Pet. App. 2a.

This holding conflicts with decisions of this Court, Pet. 12-13, and with other appellate decisions in other State courts. Pet. 13-22. Indeed, we illustrated with several cases that the lower courts are in severe disarray over how to resolve disputes that arise within religious communities. For example, we showed that Presbyterians are treated differently on the issue of ownership of parish property after a defection from the national church, depending on whether they reside in Pennsylvania or in Maryland. *Compare Presbytery of Beaver-Butler of United Presbyterian Church v. Middlesex Presbyterian Church*, 507 Pa. 255, 489 A. 2d 1317, *cert. denied*, 474 U.S. 887 (1985), with *Babcock Memorial v. Presbytery of Baltimore*, 464 A. 2d 1008 (Md. 1983). Pet. 18-19. And we showed that Episcopalians are treated differently on the same issue depending on whether they live in Kentucky or in Michigan. *Compare Bjorkman v. Protestant Episcopal Church in the United States*, 759 S.W. 2d 583 (Ky. 1988) with *Bennison v. Sharp*, 329 N.W. 2d 466 (Mich. App. 1983). Pet. 18-21.

Respondents try to minimize this glaring conflict by the avoidance of any substantive discussion of these cases, preferring not to "detain the Court with a discussion of how *Jones* has affected the Presbyterian and Episcopalian churches." Br. in Opp. 9. The Court can get a better understanding of how *Jones* has adversely affected these churches by reading the Brief Amicus Curiae filed in support of certiorari by the Stated Clerk of the Presbyterian Church (U.S.A.) and other religious organizations,

including all of the major Orthodox Christian communions in this country.

Respondents suggest that we relied falsely upon all of the precedents of this Court involving Orthodox Christians – from *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1954)[3] to *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) – for the proposition that these cases "assume correctly that the polity of these [Orthodox] religious organizations is hierarchical." Br. in Opp. 10, citing Pet. 13. At one point in their argument they suggest that this Court's characterization of ROCOR as hierarchical in the *Kedroff* case "has no probative value in this action." Br. in Opp. 10. Two sentences later they concede that this Court "simply assumed that both ROCOR and its protagonist, the Moscow Patriarchate, were hierarchical." Id. It escapes us why *Kedroff* does not support the obvious fact that the Petitioner here is the hierarchy of a hierarchical church. The Court can easily satisfy itself on the hierarchical nature of ROCOR by referring to the Regulations of the church, Pet. App. 25a-35a, and to the Normal Parish By-Laws Adopted by the Respondent, Pet. App. 36a-44a.

At another point Respondents suggest that our reliance upon several decisions involving the Serbian Eastern Orthodox Church, including *Milivojevich*, is flawed because of differences between the governing documents of that church and of ROCOR. Br. in Opp. 12. This

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[3] Respondents erroneously suggest that this case involved ROCOR. Br. in Opp. 10. In fact *Kedroff* involved the Orthodox Church in America, a different religious community that joined the Brief Amicus Curiae in support of certiorari.

characterization completely misses the point of our reliance upon the Serbian Orthodox cases, which we cited in the Petition to illustrate that the State courts are not in agreement with one another over whether that church is truly hierarchical or not. Churches do not have to be identical in polity or even in communion with one another in order to fall within the same classification as hierarchical. Thus although Episcopalians, Mormons, Orthodox Christians, Presbyterians, and Roman Catholics are by no means identical religious communities in full communion with one another, all of them are deeply committed to a hierarchical structure of governance. Similarly, although Jews and Muslims are obviously different religious communities, as are Baptist Christians and members of the United Church of Christ, all of them are congregational in their polity.

Even if one were inclined to agree that some artful distinctions might preserve greater harmony between this case and some of the cases that we cited in the Petition, Respondents strain credulity to the limit when they deny the existence of *any* conflict between the decision below and the decisions of this Court and any other state courts of last resort. Br. in Opp. 12-13. Commentators have recognized for years the lack of coherence or unity in the approach by civil courts to the resolution of controversies among religious communities. *See, e.g.*, John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 Cal. L. Rev. 847 (1984); William Ross, *The Need for an Exclusive and Uniform Application of "Neutral Principles" in the Adjudication of Church Property Disputes*, 32 St. Louis U.L.J. (1987); and Patty Gerstenblith, *Civil Court Resolution of Property Disputes*

Among Religious Organizations, 39 Am. U. L. Rev. 513 (1990). After fifteen years of state courts decisions going every which way in this area of the law, one might reasonably expect Respondents to offer some better approach to the problem than to deny its very existence. This kind of wishful thinking by the Respondents merely escalates the meaning of the word "denial" to new psychological heights.

2. Respondents underestimate the value of this case as a vehicle for sending a clearer message to the lower courts about the need to respect the polity of religious communities. If any religious community, whether congregational or hierarchical, brings a dispute to a civil court for resolution, it is not the government's business to transform that group's polity, but to resolve the dispute without affecting that religious conviction about the governance of the community. One way of thinking of this limit on governmental power is that it is mandated by the no-establishment principle of the Religion Clause – that the government may not prefer one form of religious polity over another, subtly or overtly. Another way of thinking about it is that it is mandated by the free exercise principle of the Religion Clause – that the government may not interfere with a deeply held religious belief or practice without a correspondingly grave secular reason for doing so. On either view, as the *Amici* suggest, all of the religious communities who joined in that brief "have a strong interest in keeping the government out of affairs that are beyond its jurisdiction and literally none of its business." Br. Am. Cur. 3.

Respondents intimate that this Court is incapable of sending this message to the lower courts by means of an

opinion in this case. In their words, "By granting the Synod's petition, this Court would achieve nothing." Br. in Opp. 9. They suggest two reasons for this conclusion, neither of which is sound.

a. Respondents badly misstate the record when they suggest that this case does not afford this Court an opportunity to reflect serenely on its ruling in *Jones v. Wolf*. Br. in Opp. 6-9. The Supreme Judicial Court of Massachusetts did in fact allude to this Court's opinion in *Jones*, which the lower court cited in *Fortin v. Roman Catholic Bishop of Worcester*, 416 Mass. 781, 625 N.E. 2d 1352 (1994). Pet. App. 3a. The amazing thing about *Fortin* is that the lower court is capable of recognizing the obvious fact that the Roman Catholic Church is a hierarchically governed community, but seems unable or unwilling to do so when the Russian Orthodox Church comes before the court with an equally venerable and clear tradition of hierarchical polity. This glaring inconsistency in the treatment of religious communities by the same court is itself a reason for granting the writ, for such discrimination is prohibited under the Religion Clause. Pet. 23-30.

b. Respondents suggest that the "ony [sic] question presented to this Court is whether the Supreme Judicial Court correctly held that the trial court's findings of fact were not clearly erroneous." Br. in Opp. 9. This statement misapprehends the function of this Court, which does not sit to correct errors, but to give sound guidance in cases of national significance such as this one. This view also misstates the appropriate standard of review that governs "cases raising First Amendment issues [where] . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make

sure that 'the judgment does not constitute a forbidden intrusion' " in an area protected by the First Amendment. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984), citing *New York Times v. Sullivan*, 376 U.S. 254, 284-286 (1964). If the lower courts had not ignored the *Bose* requirement in this case, they would have found ample evidence to ground the conclusion that state courts are prohibited under *Jones v. Wolf* "from awarding the property of an historically hierarchical church to a local congregation that unilaterally amends its bylaws to repeal its allegiance to the church in violation of the governing documents of the church." Pet. i. (first question presented).

CONCLUSION

For these reasons and for those stated in the Petition, this Court should grant the Petition for Certiorari.

Respectfully submitted,

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